BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RONALD COLEMAN COCHRAN Claimant V. **ROYAL PAPERS, INC.** Respondent AND **TECHNOLOGY INSURANCE COMPANY** and **NETHERLANDS INSURANCE COMPANY**[1] Insurance Carrier	)	Docket No. 1,069,716

ORDER

Respondent and its carrier Technology Insurance Company (respondent) request review of the November 12, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) William G. Belden.

APPEARANCES

Denise E. Tomasic, of Kansas City, Kansas, appeared for the claimant. Katie M. Black, of Kansas City, Kansas, appeared for respondent and Technology Insurance Company.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from August 27, 2014, the August 21, 2014, deposition of Matthew Passanise, with exhibits attached, the transcript of Preliminary Hearing from November 5, 2014, with exhibits attached, and the documents of record filed with the Division. The ALJ did not consider claimant's June 10, 2014 deposition.

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[1] There are two insurance carriers listed, Technology Insurance Company (Technology) and Netherlands Insurance Company (Netherlands). Netherlands is a different company from Technology. Katie Black represents only respondent and Technology. Technology was on the risk on May 21, 2014, the agreed upon date of accident for preliminary hearing purposes. There was no representation for Netherlands at the hearing.

ISSUES

The ALJ found claimant met his burden of proving he developed bilateral carpal tunnel syndrome from repetitive trauma arising out of and in the course of his employment with respondent and that the repetitive trauma is the prevailing factor in claimant's injuries and need for treatment. Claimant was granted medical treatment under the direction of board certified plastic and hand surgeon, John B. Moore IV, M.D., with any tests, treatment or referrals to be paid for by respondent. Claimant was awarded temporary total disability compensation (TTD) from May 21, 2014, through September 22, 2014, at $526.15 per week, but denied additional TTD on or after September 23, 2014.

Respondent appeals arguing claimant failed to meet his burden of proving his work activities are the prevailing factor in causing his bilateral carpal tunnel syndrome. Respondent also argues the ALJ erred when he discredited respondent's account of claimant's work duties in favor of claimant's unsubstantiated testimony. Respondent further argues the ALJ erred in ordering temporary total disability benefits for a period of time during which claimant declined an offer of accommodated worked based on restrictions from Dr. Fevurly, where the restrictions were the same as those issued by Dr. Moore.

Respondent disputes the compensability of this claim as the decision hinges on the credibility of the testimony of claimant versus his supervisor, Mr. Passanise, who was not available to testify at the November 5, 2014, preliminary hearing. Because of this, respondent contends it was denied the opportunity to defend on the issue of causation.[2] Respondent contends it was not given the opportunity to dispute whether the work duties were the prevailing factor causing the repetitive trauma as asserted by claimant. Respondent further contends Dr. Moore's causation opinion should be disregarded due to a lack of information necessary to form a proper opinion. Respondent argues the ALJ misapplied the statute governing temporary total disability payments by allowing a non-authorized treating physician's restriction to be presumed determinative. Respondent argues the ALJ's Order should be overturned or remanded.

Claimant contends the Order should be affirmed in regard to the award of benefits and modified to extend the award of temporary total disability benefits to November 21, 2014. Claimant argues his duties for respondent were the prevailing factor causing his development of bilateral carpal tunnel syndrome and the need for medical treatment.

[2] It is noted Mr. Passanise did testify by deposition on August 21, 2014.

Issues on appeal are:

1. Were the work duties performed by claimant with respondent, the prevailing factor in causing repetitive trauma leading to the development of carpal tunnel syndrome?

2. Did the ALJ exceed his authority and/or jurisdiction in granting benefits?

FINDINGS OF FACT

Claimant is alleging personal injury from repetitive trauma. The parties are using May 21, 2014, as the legally operative date of injury by repetitive trauma for claimant's requested medical treatment and temporary total disability compensation.

Claimant began working for respondent in April 2011 as a distribution and warehouse manager. He was not provided with a job description when he was hired, but claimant testified he received a job description after he was taken off work for his injury. Claimant supervised four employees, but only one of those employees worked in the warehouse with him. He testified that when one of his people was off work sick or on vacation he was required to cover that position as well as his own. Claimant reported to Matt Passanise, who visited the warehouse one or two days a month. Claimant testified Mr. Passanise never worked alongside him when he came to the warehouse. Mr. Passanise spent the majority of his time at the St. Louis location.

Respondent supplies paper products and janitorial supplies to businesses. Respondent deals in toilet paper, paper towels, toilet bowl cleaners, 300 pound drums of oil dry, rags in 10 to 50 pound boxes, office paper and anything needed to clean a commercial building or supply it with paper products. Claimant worked in the Lenexa location that included a warehouse, office space, a showroom and restrooms.

Claimant testified his job was to make sure the orders were correct, which required he pull items off the skid, check them off the order sheet and restack the items on the skid. Claimant testified he checked the orders and he and the warehouse worker pulled the items from the shelves with one of them driving the forklift while the other pulled boxes off the shelves. The next day the order would be double checked, wrapped and loaded on the truck for delivery. This process required claimant lift boxes weighing anywhere from one pound to 300 pounds. The process required that claimant pinch with his fingers and grip and lift with his hands. He testified he used a machine to help with the lifting when it was available.

Claimant testified the warehouse filled 30 plus orders a day. The warehouse also received deliveries of product to restock their supply. These shipments would be checked and unloaded and then stocked on the shelves. This was a team effort between claimant and the warehouse worker.

On April 29, 2014, there was one delivery to the warehouse. The shipment had 197 pieces and the weights of the products ranged from 8 to 36.6 pounds. Claimant testified that, depending on the day, there could be multiple deliveries. On May 1, 2014, there was a delivery with 873 pieces weighing 8,731 pounds. Everything was unloaded one piece at a time, checked and stocked on the shelves one piece at a time. Claimant testified these activities required he use his hands to pinch, grip and lift. The same procedures were used for deliveries and transfers. Claimant testified he also performed daily checks of the stock and when the count was off he would phone, text or email the other locations to resolve the problem.

Claimant testified it was also his responsibility to keep the warehouse, showroom, bathrooms and offices safe and clean. He had assistance from the warehouse worker with this task. Claimant testified the warehouse is 18,000 square feet, with the showroom being between 2,000 and 3,000 square feet. Claimant testified he would sweep on a daily basis and spot mop between auto scrubbing. Auto scrubbing was completed using a machine that vibrated. The machine has a handle similar to a lawn mower. Another machine is used to shine the floors. Claimant testified there was some sort of cleaning every day.

Claimant testified another part of his job was to maintain any equipment that was used around the warehouse and the showroom. He testified that the 20 machines in the rental fleet needed monthly maintenance. Under the direction of Mr. Passanise, claimant would fix whatever he was able to save money. Claimant testified he was provided the tools necessary to make repairs. Those tools included hand tools, ratchets, wrenches and screwdrivers. Claimant testified there was never a third party contracted to work on the rental fleet, but a third party was used to provide preventative maintenance to the forklift, order pick and electric pallet jacks. The company, Bublitz Machinery out of North Kansas City, would change oil and other fluids and check belts.

Claimant testified that over the years of his employment with respondent, things got busier as product sales more than doubled.

Claimant first noticed problems with his upper extremities toward the middle or end of March 2014. He testified his symptoms included numbness and tingling in his fingers, trouble sleeping and a shocking sensation when pinching. Claimant testified he mentioned his symptoms to Mr. Passanise and went to a chiropractor. On May 21, 2014, claimant went to his personal physician, Danelle L. Perry, M.D., and was diagnosed with bilateral carpal tunnel syndrome. Claimant testified Dr. Perry told him there is no reason for a man his age to have carpal tunnel syndrome for any reason other than work. Claimant relayed this information to Mr. Passanise and received no response, until he obtained counsel. Claimant indicated he agreed with Dr. Perry's diagnosis because any gripping motion he did with his hands caused numbness and sharp pain. The only activities claimant performed outside of his work were the normal daily activities of caring for his kids.

Claimant testified respondent offered to bring him back to work, but with no accommodations within his assigned restrictions. He was told his work was already within his restrictions. Claimant did not accept the offer and eventually resigned because he didn't feel it was in his best interests to go back to the same work.

At his attorney's request, claimant met with board certified orthopedic surgeon, Lynn D. Ketchum, M.D., on June 19, 2014, for a determination of causation, recommendations for future medical treatment and work restrictions. At this evaluation, claimant had pain and numbness in both hands. His grip strength bilaterally was significantly weak, with limited key pinch bilaterally. Tinel sign was negative at both wrists, but Phalen's test was bilaterally positive. Dr. Ketchum diagnosed claimant with bilateral carpal tunnel syndrome. He opined that, since claimant had no symptoms prior to beginning work for respondent and did almost constant repetitive work with his hands; the prevailing factor in claimant's development of bilateral carpal tunnel syndrome is the heavy repetitive work. Dr. Ketchum recommended carpal tunnel releases, after which claimant would be allowed to return to work.

Claimant met with Chris Fevurly, M.D., on July 29, 2014, for an examination. Dr. Fevurly noted claimant had a preexisting left wrist injury from boxing in school. In 1998, claimant suffered multiple injuries as a result of a car accident. The injuries were to his left shoulder, left elbow and pelvic bone, and lacerations to his head and ear. Dr. Fevurly noted claimant was in another car accident in 2002, which aggravated his left shoulder injury. Claimant received treatment for these injuries, including physical therapy, and missed about one year of work.

Dr. Fevurly noted claimant reported the onset of bilateral hand pain and numbness in early March 2014. This problem had been only occasional in the past and never in both hands. Claimant initially sought chiropractic treatment for his neck, thinking his upper extremity symptoms were related to cervical spine problems.

Claimant's complaints included bilateral hand numbness and pain, worse at night and bilateral elbow pain with the left upper extremity worse than the right. Claimant could do light housekeeping, but avoided laundry and dishes. Claimant had tenderness over both elbows with full range of motion in the elbows and forearms. He had no pain in the elbows with active resistence to wrist extension or with forceful grip. Claimant also had full range of motion in both wrists. Dr. Fevurly diagnosed bilateral median nerve entrapment at the wrist with severe bilateral carpal tunnel syndrome and mild lateral epicondylitis in both elbows. He found no evidence of ulnar nerve entrapment at the elbows and no evidence for cervical radiculopathy or myelopathy as the source of pain.

Dr. Fevurly opined claimant's work duties do not place claimant at increased risk for development of median nerve entrapment (carpal tunnel syndrome). They also do not meet the criteria of high repetition and high force. He found the prevailing factor to be

claimant's elevated BMI, with claimant standing 6 feet 2 inches tall and weighing 350 pounds.

Mr. Passanise, general manager for the Kansas City branch of Royal Papers since September 2009, testified he has been employed by respondent in some capacity full-time for fifteen years. He is involved in sales and manages other employees. He testified that until April 2014 he spent, on average, two days a week in Kansas City and the rest of his time at the St. Louis branch as a salesperson. He started coming to Kansas City in March 2009. Mr. Passanise became acquainted with claimant when he hired claimant in 2011. Claimant was hired as the warehouse and distribution manager and was considered a salaried employee.

Mr. Passanise testified claimant's job was to manage two drivers and a warehouse worker. Claimant was responsible for tracking their hours along with his own. Mr. Passanise testified claimant was on a bonus commission structure and, on a quarterly basis, was paid bonuses based on his performance in keeping labor costs down for the people he managed versus the sales for that particular quarter. Claimant was paid 20 percent of the difference between the previous year's numbers and the current year's numbers. The bonus was also determined at the discretion of Mr. Passanise and how he felt claimant was doing in his work. Claimant earned $3,557.20 in bonuses in 2013. Claimant's bonus increased over time as his work performance improved.

Mr. Passanise disagreed with claimant's statement that his work involved extensive gripping. Mr. Passanise testified claimant's physically handling paperwork was limited to holding a piece of paper, checking to make sure the pallets have the correct product and checking off with a pen the items on the orders. He described the managerial positions use of a computer as sporadic, with no extensive typing. He also testified claimant's job did not require heavy lifting. He testified claimant did not have to do any of the physical work and was to delegate those tasks to someone else. Mr. Passanise testified claimant never reported having problems with the workers not wanting to perform any of the cleaning duties and leaving claimant to do the work himself.

Mr. Passanise acknowledged claimant is responsible for keeping the machines maintained, but this is done by calling in a third party to fix any machines that needed repair or for planned maintenance. He testified the company has three major pieces of equipment: a propane powered forklift, a battery powered electric pallet jack and a battery powered scissor lift. There is also a 12 inch upright vacuum used for cleaning. Mr. Passanise testified that the company's service department in St. Louis works on the equipment that is sold or rented and is not part of planned maintenance.

Mr. Passanise testified he did not know of the office manager, Jane Kingsley, missing a lot of work to where claimant had to fill in for her. It is Ms. Kingsley's job to handle all of the incoming orders. If she happens to be on another line with a customer or away from her desk, the other phones will ring and someone else will take the call. When

an order is entered into the system, a copy of the order is printed out for the warehouse worker to pick up and fill. The orders come in by phone, fax, online and in person. Claimant was responsible for checking the order once filled and before the driver leaves with it. Claimant was also responsible for checking in products that were delivered to the warehouse. The warehouse averaged 15 to 20 orders a day.

Mr. Passanise testified he received a text from claimant on March 9, 2014, giving notice that his back was messed up all day and he didn't know if he was going to be in the next day. Claimant did not indicate his back problem was work-related. Mr. Passanise testified the first he became aware of an alleged work-related injury was on May 6, 2014, when he received an email from claimant. He created no written report that claimant had a work-related back problem. The first mention of any kind of related numbness was an April 9, 2014, chiropractic note. Claimant sent a text on April 10, 2014, reporting his neck was messed up and his arms were numb, and he wouldn't be in to work that day.

On April 11, 2014, claimant came in and spoke with Mr. Passanise about having some major back issues and that his chiropractor indicated claimant had aggravated an old injury from a prior car accident. Claimant also reported problems with his neck and arm numbness. Claimant reported this was not from his work. Claimant saw a neurologist on his own on April 15, 2014. Mr. Passanise testified claimant asked about temporary disability on April 30, 2014, but still did not mention his condition was work-related

Mr. Passanise testified that when claimant sent him the email about a work-related injury, he briefly spoke with claimant and asked if claimant was now alleging the injuries were work-related. Claimant said yes. Mr. Passanise testified that claimant elaborated by saying the new injury was separate from the first, that 90 percent the wrist injury was work-related.

At the time of Mr. Passanise's deposition, claimant was still considered an employee of respondent, and Dr. Fevurly had given claimant temporary restrictions of avoiding repetitive forceful hand tasks with either upper extremity. Mr. Passanise testified that claimant's normal work duties did not go against his restrictions and he emailed claimant that he could return to work. Claimant in turn asked for time off and then Mr. Passanise heard from claimant's attorney. Mr. Passanise testified that at the time of his deposition, there was still a job available for claimant. He also indicated claimant was a very good employee.

There was no pre or post employment physical conducted. Mr. Passanise acknowledged the job duties of the warehouse manager grew over time. He testified there are five people that work in the warehouse, the warehouse manager, the office manager, two drivers and one warehouse employee. Only the warehouse employee, the manager and office manager are in the warehouse full-time. The warehouse is approximately 13,500 square feet and the offices and showroom add an additional 3,500 square feet.

Mr. Passanise testified the employee handbook contains instructions on how to report an on-the-job injury. The first step is to notify the manager immediately, then the situation is evaluated. The safety of the employee is the first priority. An accident report is not required and an employee may seek treatment with any physician they choose. Mr. Passanise indicated that it was not all that unusual for claimant to go to the doctor on his own. His only objective is for claimant to choose the best way to get himself healthy. That is why, when Dr. Perry told claimant he had bilateral carpal tunnel syndrome and should not work, respondent allowed claimant to be off work, but held his position for him. Mr. Passanise was not aware that Dr. Ketchum diagnosed claimant with bilateral carpal tunnel syndrome and that his work was the cause.

Mr. Passanise has not worked alongside claimant since 2011, and because he was not at the warehouse everyday, he couldn't testify to what claimant did throughout the workday. He did communicate with claimant on a daily basis. Mr. Passanise testified that while claimant was off work he personally filled in for him and made official cleaning assignments to the staff and had them sign off upon completion of the assignments. Additionally, Mr. Passanise was in the position of warehouse manager at the Lenexa location from September 2009 through March 2011.

Mr. Passanise believes claimant was made to believe his carpal tunnel syndrome was work-related by his doctor. He didn't feel claimant's doctor knew enough about claimant's work to determine the carpal tunnel syndrome was work-related. He also testified the doctor's description of what would cause carpal tunnel syndrome does not match the duties claimant was expected to perform.

Mr. Passanise testified that as soon as he learned claimant was claiming a work injury he notified the company's COO, who reported it the company broker, who turned the information in to the insurance carrier. At no time did Mr. Passanise provide Dr. Ketchum or Dr. Perry with information about claimant's job duties.

Mr. Passanise was contacted by claimant by email on August 11, 2014, regarding the possibility of claimant returning to work within his restrictions. Mr. Passanise responded that he would work with claimant to ensure the duties at work accommodated the restrictions from Dr. Fevurly. The job description, marked as Exhibit 7 to the deposition, was prepared by Mr. Passanise on May 19, 2014. There remained questions regarding claimant's work schedule and his ability to accompany his children to school. The email does not appear to be a definite offer of accommodated work. It was more an exchange of information and the assurance that accommodations would be made. At his deposition on August 21, 2014, Mr. Passanise testified the job remained available to claimant.

After the preliminary hearing on August 27, 2014, the ALJ referred claimant to Dr. Moore for an independent medical examination to determine what factors contributed to claimant's bilateral upper extremity conditions, what medical treatment was necessitated by claimant's upper extremity conditions and what work restrictions, if any, were necessary.

In his report of September 23, 2014, Dr. Moore identified claimant's physical problems as bilateral carpal tunnel syndrome, with claimant's job activities being the prevailing causative factor in the carpal tunnel syndrome development. Surgery was recommended with the right hand being scheduled first and the left to follow in three weeks. Claimant's return to full duty was projected to occur in approximately six weeks and maximum medical improvement was anticipated in six months.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501b(b)(c) states:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(d)(e) states:

> (d) "Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident'' shall in no case be construed to include repetitive trauma in any form.
> (e) "Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury.
> "Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related;
> or

> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
> In no case shall the date of accident be later than the last date worked.

K.S.A. 2013 Supp. 44-508(f)(1)(2)(A) states:

> (f)(1) "Personal injury'' and "injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
> (A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

K.S.A. 2013 Supp. 44-508(g) states:

> (g) "Prevailing'' as it relates to the term "factor'' means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

It is undisputed claimant suffers from bilateral carpal tunnel syndrome. The dispute centers around the cause of that condition and how it relates to claimant's job with respondent. The job description provided by claimant to the doctors varies significantly from the description provided by respondent. Respondent's warehouse is a distribution center for paper products with materials coming in and going out on a regular basis. It is difficult to accept that claimant worked in this environment with only one regular assistant without having to daily physically handle these materials as orders are created and completed. This Board Member finds claimant's description of his job duties to be more credible than the job description provided by respondent.

The prevailing factor/causation opinion of Dr. Moore relies on the job description of claimant. This Board Member finds that opinion to be persuasive in this instance, for preliminary hearing purposes. Claimant has satisfied his burden of proving he suffered personal injury by repetitive trauma while working for respondent and that repetitive trauma is the prevailing factor in causing claimant's medical condition and need for carpal tunnel

surgery. The ALJ did not exceed his authority and/or jurisdiction in granting claimant benefits in this instance. The Order of the ALJ granting claimant medical benefits with Dr. Moore as the treating physician is affirmed.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accident, repetitive trauma or resulting injury?

2. Did the injury arise out of and in the course of the employee's employment?

3. Did the worker provide timely notice?

4. Is there any defense that goes to the compensability of the claim?[3]

K.S.A. 44-534a grants the ALJ the authority to determine a claimant's request for temporary total disability compensation at a preliminary hearing. The Board's review of preliminary hearing orders is limited as above noted. An award of TTD is not an issue over which the Board takes jurisdiction from an appeal of a preliminary hearing order. The appeal by respondent on this issue is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has satisfied his burden of proving that he suffered personal injury by repetitive trauma which arose out of and in the course of his employment with respondent and that repetitive trauma is the prevailing factor in claimant's need for medical treatment as ordered.

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[3] K.S.A. 2013 Supp. 44-534a(a)(2).

[4] K.S.A. 2013 Supp. 44-534a.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge William G. Belden dated November 12, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2015.

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HONORABLE GARY M. KORTE
BOARD MEMBER

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